Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of AT&T Services, Inc. For	)	
Forbearance Under 47 U.S.C. § 160(c) From	)	WC Docket No. 16-363
Enforcement Of Certain Rules For Switched	)	
Access Services And Toll Free Database Dip	)	
Charges	)	
	)	

CONSOLIDATED COMMUNICATIONS COMPANIES AND WEST TELECOM SERVICES, LLC'S MOTION FOR SUMMARY DENIAL OF AND OPPOSITION TO AT&T'S PETITION

Philip J. Macres
KLEIN LAW GROUP PLLC
1250 Connecticut Avenue N.W.
Suite 200
Washington, DC 20036
Tel: 202-289-6956
Email: pmacres@kleinlawpllc.com

Allen C. Zoracki
KLEIN LAW GROUP PLLC
90 State Street
Suite 700
Albany, NY 12207
Tel: 518-336-4300
Email: azoracki@kleinlawpllc.com

Counsel for Consolidated Communications Companies and West Telecom Services, LLC

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Attachments

Exhibit A: AT&T Corporation's Motion to Dismiss in Part Plaintiff's Complaint; Memorandum of Points and Authorities in Support, Case No. 3:16-cv-01452-VC, Doc. 22 (N.D. Cal., filed Apr. 26, 2016)

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In accordance with the Commission's Public Notice concerning the above-captioned matter,[1] Consolidated Communications Companies ("Consolidated") and West Telecom Services, LLC ("West Telecom") submit this Motion for Summary Denial and Opposition to the Petition of AT&T Services, Inc. for Forbearance Under 47 U.S.C. § 160(c) (the "Petition").

I. INTRODUCTION AND SUMMARY

Consolidated and West Telecom, two very different companies but both major providers of tandem services—including tandem switching, tandem-switched transport and 8YY database query services at issue in this case, jointly oppose the Petition due to the significant disruption and uncertainty that the proposed forbearance would cause in the tandem service market. Consolidated is a price cap incumbent Local Exchange Carrier ("LEC") in 11 states that offers a wide range of communications solutions, including data, voice, video, managed services, cloud

[1] *Pleading Cycle Established for Comments on AT&T's Petition for Forbearance from Certain Tariffing Rules*, WC Docket No. 16-363, Public Notice, DA 16-1239 (rel. Nov. 2, 2016).

computing and wireless backhaul.[2] West Telecom is a competitive LEC ("CLEC") in 48 states that provides wholesale voice origination and termination services, for other carriers and service providers, that allow for the efficient exchange of traffic between different networks.[3]

The tandem services offered by Consolidated and West Telecom are a fundamental component of today's telecommunications network backbone, providing carriers of all types with efficient traffic exchange options. The availability of such services also promotes important public policy objectives—such as improved network diversity, network security, and disaster recovery—by adding network redundancy and alternative routing options.

Given the many different carriers that exchange traffic with tandem providers like Consolidated and West Telecom, permissive tariffing of rates for tandem services is crucial. For example, permissive tariffing allows tandem providers to avoid the high costs associated with negotiation of individual agreements with the many different service providers that utilize tandem services. The default, legally enforceable rates and terms established under permissive tariffs thus allows tandem providers to drastically reduce market entry and transaction costs and have an efficient means of charging for services provided. In recognition of this, the Commission ensured that its recent adoption of intercarrier compensation reforms and access stimulation rules promulgated in the Connect America Fund ("CAF") proceeding were limited to avoid impacting the tandem services market where the tandem owner did not own the end office.[4]

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[2] *See, e.g.*, https://www.consolidated.com/about-us.

[3] *See, e.g.*, https://www.west.com/telecom-services/network/.

[4] *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform—Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208 (collectively "CAF proceeding"), Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) ("*USF/ICC Transformation Order*"), *aff'd*

As such, any sudden mandatory detariffing of legitimate tandem services would significantly increase transaction costs of tandem providers and jeopardize their ability to get paid for the services they provided. Likewise, AT&T's proposed mandatory detariffing of charges for 8YY database dips would create similar uncertainties for such providers. To avoid these harmful effects, the Commission should deny the Petition, either through summary denial or on substantive grounds as summarized below.

As a threshold matter, a forbearance request cannot be granted unless doing so is, among other things, in the public interest.[5] AT&T's Petition should be denied on this fundamental basis alone. In this case, the public interest demands that the regulatory reforms the Petition seeks be considered holistically and comprehensively within the context of the CAF proceeding and its extensive evidentiary record, not in this forbearance proceeding. Upon painstaking review of the CAF proceeding's record, the Commission specifically *declined* to adopt the reforms that AT&T's Petition now requests be imposed. Indeed, any grant of the requested forbearance would contravene the both (1) the findings of the *USF/ICC Transformation Order* and (2) the Commission's goal of ensuring all inter-related intercarrier compensation reforms are implemented through a holistic approach, rather than through piecemeal reforms such as those AT&T now seeks. Moreover, the requested reforms are not otherwise in the public interest, because the default rates permitted under the Commission's current permissive tariffing framework are just and reasonable and no evidence suggests that complete detariffing is otherwise necessary.

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sub. nom. In re: FCC 11-161, 753 F.3d 1015 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2072 (2015).

[5] *See* 47 U.S.C. § 160(a)(3).

Apart from this overarching reason for denying the Petition, even when viewed in the light most favorable to AT&T, the Petition should be summarily denied for two reasons. First, the Petition lacks the requisite evidence and analysis to support a forbearance requested. These shortcomings cannot be overstated because the Petition is devoid any granular evidence or market analysis, nor does it contain any affidavits or other evidence to support its factual assertions. In fact, most of the citations contained in AT&T's Petition refer to the *USF/ICC Transformation Order*, in which the FCC expressly decided not to detariff services as part of the reforms made based on that proceeding's record. Stated differently, AT&T's Petition is effectively a belated petition for reconsideration of the *USF/ICC Transformation Order* that should not be countenanced and should be denied summarily. Second, AT&T's request that the Commission forbear from permissive tariffing rules for carriers *not even engaged in access stimulation*—an incredibly broad request that AT&T subtly makes in an unsupported footnote—indisputably fails to "address [the] issue at a sufficiently granular level to permit meaningful analysis of whether or not the statutory criteria are met," as the Commission requires.[6]

While AT&T's Petition should be denied summarily, AT&T's forbearance theories, even if considered substantively, fail to satisfy the three statutory forbearance criteria under 47 U.S.C. § 160(a). Indeed, as to AT&T's request that the Commission forbear from rules that permit tariffing of tandem switching and tandem-switched transport access charges on calls to and from third-party LECs engaged in access stimulation (even where the tandem provider is not engaged in access stimulation), the Petition fails to satisfy the statutory criteria. In particular, the Petition fails to show that the permissive tariffing rules are not necessary to ensure charges and practices

[6] *In the Matter of Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Report and Order, WC Docket No. 07-267, 24 FCC Rcd 9543, ¶ 30 (2009) ("*Forbearance Procedure Order*").

remain just and reasonable and not unjustly and unreasonably discriminatory. AT&T failed to meet its burden in this connection, which encompasses both the burden of production and the burden of persuasion, because the Petition lacks any detailed, convincing analysis and evidence. At best, the Petition merely describes a few, unsupported encounters that, if truly problematic, could be addressed on a case-by-case basis in a Section 208 complaint proceeding.

Moreover, the permissive tariffing rules at issue *are necessary* to ensure that IXCs do not use the absence of a tariff to avoid payment altogether, which would likely occur given historical practices. Permissive tariffing rules are also necessary to provide a level playing field for competitive providers of tandem switching and tandem-switched transport. For these reasons, and because the Commission's existing rules already ensure that rates for tandem switching and tandem-switched transport are just and reasonable, the forbearance requested is wholly unnecessary and thus cannot be granted pursuant to the first statutory criterion. Similarly, the Petition fails to show that the Commission's permissive tariffing rules are not necessary for the protection of consumers or that the forbearance requested is consistent with the public interest, as the second and thrid stautory criteria respectively require. In fact, for a variety of reasons, the permissive detariffing protects and benefits consumers and are in the public interest.

For similar reasons, among others, the Petition's request to forbear from rules permitting tariffed charges for 8YY database dips also fails to satisfy these three statutory criteria. Contrary to AT&T's claims, permissive tariffing of charges for 8YY database dips remains necessary to ensure that such charges are just and reasonable and that consumers and the public interest are protected. Having thus failed to satisfy the statutory criteria for each of its forbearance requests, the Petition should be denied *in toto.*

Given the significant problems associated with the mandatory detariffing AT&T seeks, Consolidated and West further note—solely for the sake of completeness—that if any of the requested forbearance is granted (which it shouldn't be), the Commission must impose specific conditions and make certain clarifications, as detailed in Section VI *infra*, to ensure that IXCs cannot obtain a windfall in the absence of tariffed charges for the services at issue. If such safeguards were not adopted in connection with any forbearance grant, IXCs would attempt to obtain the services associated with the mandatory detariffed charges for free which, in turn, would negatively impact the processing of calls by providers of tandem switching, tandem-switched transport, and 8YY database services and serve to negatively "degrade the reliability of the nation's telecommunications network."[7]

II. THE REGULATORY REFORMS THE PETITION SEEKS SHOULD BE CONSIDERED IN THE FCC'S CAF PROCEEDING, NOT IN THIS FORBEARANCE PROCEEDING

A. The Public Interest Requires that the Reforms Sought in the Petition Be Considered "Comprehensively" and "Holistically" within the Context of the Commission's Ongoing CAF Proceeding and Its Extensive Evidentiary Record

Before addressing all of the Petition's deficiencies that justify denying it summarily or on substantive grounds, it warrants emphasizing upfront that denial is especially appropriate because the Petition improperly seeks to hijack significant remaining issues already being addressed in the Commission's ongoing CAF proceeding and its implementation of the *USF/ICC Transformation Order*.[8] As discussed in Section III below, a forbearance request cannot be

[7] *In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, Declaratory Ruling and Order, 22 FCC Rcd 11629, ¶ 5 (2007) ("*2007 Declaratory Ruling*").

[8] *See generally USF/ICC Transformation Order.*

granted unless doing so is, among other things, in the "public interest."[9] AT&T's Petition cannot be granted on this fundamental basis alone, because the public interest demands that such significant reforms be addressed comprehensively and holistically within the context of the CAF proceeding and its extensive evidentiary record, and not via a forbearance proceeding.

By way of background, on November 18, 2011, the Commission issued its *USF/ICC Transformation Order* that comprehensively reformed its intercarrier compensation and universal service rules to promote broadband availability for all Americans. As the Commission is well aware, the issuance of the order was an incredibly *massive* undertaking in which there was "enormous interest in and public participation in [its] data-driven reform process."[10] The Commission "received over 2,700 comments, reply comments, and ex parte filings totaling over 26,000 pages, including hundreds of financial filings from telephone companies of all sizes, including numerous small carriers that operate in the most rural parts of the nation."[11] Moreover, the Commission "held over 400 meetings with a broad cross-section of industry and consumer advocates, three open, public workshops, and engaged with other federal, state, Tribal, and local officials throughout the process."[12] The reforms adopted in the *USF/ICC Transformation Order* were based on the Commission's "holistic view of the entire record…[and associated considerations] designed to better serve the public interest."[13]

In the *USF/ICC Transformation Order*, the Commission comprehensively revised the rates that LECs could tariff for switched access services and, among other inter-related reforms,

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[9] *See* 47 U.S.C. § 160(a)(3).

[10] *USF/ICC Transformation Order*, ¶ 12.

[11] *Id.* ¶ 12.

[12] *Id.* ¶ 12.

[13] *Id.* ¶ 13

adopted rules to address the practice of access stimulation.[14] With respect to the tariffed switched access rate reforms, a "uniform national bill-and-keep framework" was adopted as the "ultimate end state for all telecommunications traffic exchanged with a LEC."[15] "Under bill-and-keep arrangements," the Commission stated that "a carrier generally looks to its end-users—which are the entities and individuals making the choice to subscribe to that network—rather than looking to other carriers and their customers to pay for the costs of its network."[16]

In its initial implementation of the bill-and-keep framework, the Commission decided to only transition terminating switched access rate elements to bill-and-keep, with an end date of July 1, 2018 for price cap carriers and July 1, 2020 for rate-of-return carriers.[17] As for originating access and other remaining rate elements, the Commission adopted a permissive tariffing regime and capped such rates at current levels until it establishes a transition timetable for these rate elements.[18] The Commission held, however, that the rate caps it prescribed are "default" tariffed rates, from which its rules permit carriers to deviate by agreement.[19] Concurrently, the

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[14] *Id.* ¶¶ 1, 33 & 736.

[15] *Id.* ¶ 34.

[16] *Id.* ¶ 737. In rendering this holding, the Commission rejected the blanket assertion that "bill-and-keep does not enable cost recovery" and explained:

> Although a bill-and-keep approach will not provide for the recovery of certain costs via *intercarrier* compensation, it will still allow for cost recovery via end-user compensation and, where necessary, explicit universal service support. We find that although the statute provides that each carrier will have the opportunity to recover its costs, it does not entitle each carrier to recover those costs from another carrier, ***so long as it can recover those costs from its own end users and explicit universal service support where necessary***.

Id. ¶ 757 (emphasis added); *see also, e.g., id.* ¶ 742, ¶ 775 & n.1410, ¶ 849, ¶ 994.

[17] *See id.* ¶ 801, Fig. 9; *see also* 47 CFR §§ 51.907 ("Transition of price cap carrier access charges."), 51.909 ("Transition of rate-of-return carrier access charges.").

[18] *See USF/ICC Transformation Order*, ¶ 739, ¶ 800 & n.1494.

[19] *See* 47 CFR § 51.905(a).

Commission adopted recovery mechanisms that authorized LECs to, in part, assess various charges on their own end users to mitigate the effect of the revenue declines associated with the transition to bill-and-keep.[20]

Significantly, the Commission did not impose the transition to bill-and-keep on carriers that do not serve end-users, such as where tandem and transport providers do not own the end office, because they cannot "look[] to [their] end-users … to pay for the costs of its network" as a bill-and-keep regime requires.[21] For this reason, the Commission explicitly held that "*the Order does not address the transition in situations where the tandem owner does not own the end office*."[22]

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[20] *See, e.g., USF/ICC Transformation Order*, ¶¶ 36-39 & 852; *see also* 47 C.F.R. §§ 51.915 ("Recovery mechanism for price cap carriers."), 51.917 ("Revenue recovery for Rate-of-Return Carriers."). As part of the transitional recovery mechanism, the Commission defined as Eligible Recovery the amount of intercarrier compensation revenue reductions that incumbent LECs would be eligible to recover through a combination of end-user charges (the Access Recovery Charge (ARC)) and, where eligible and if a carrier elects to receive it, intercarrier compensation replacement Connect America Fund support. A carrier's Eligible Recovery is based on a percentage of the reduction in revenue each year resulting from the intercarrier compensation reform transition. *See USF/ICC Transformation Order*, ¶¶ 850-51; s*ee also Technology Transitions, USTelecom Petition for Declaratory Ruling that Incumbent Local Exchange Carriers are Non-Dominant in the Provision of Switched Access Services, Policies and Rules Governing the Retirement of Copper Loops by Incumbent Local Exchange Carriers*, GN Docket No. 15-5, WC Docket No. 13-3, RM-11358, Declaratory Ruling, Second Report and Order and Order on Reconsideration, 31 FCC Rcd 8283, ¶ 15 & n.33 (2016).

[21] *USF/ICC Transformation Order*, ¶ 737.

[22] *Id.* ¶ 1312 (emphasis added); *see also id.* ¶ 1306 (explaining that "*we do not address the transition for tandem switching and transport charges if the…carrier does not own the tandem in the serving area*") (emphasis added); *id* ¶ 819 (stating that "transport charges…where the terminating carrier does not own the tandem [] are not addressed at this time."). The Commission clarified "[w]ith regard to tandem switching and tandem transport, at the end of the transition specified in the Order, rates will be bill-and-keep in the following [two] cases: (1) for transport and termination within the tandem serving area where the terminating carrier owns the tandem serving switch; and (2) for termination at the end office where the terminating carrier [*i.e.*, end office owner] does not own the tandem serving switch." *Id.* n.2358.

Nor did the Commission impose the bill-and-keep transition to other services—including originating switched access, processing of 8YY originated minutes, and dedicated transport—or other charges such as dedicated transport signaling and signaling for tandem switching.[23] Rather, the Commission sought further comment to supplement its existing record and determine the proper transition and recovery mechanism for the remaining elements.[24] It also invited comment on the "existing and future payment and market structures for dedicated transport, tandem switching, and tandem switched transport" and "the need for regulatory involvement and the appropriate end state for transit service," which it described as tandem switching and transport where the terminating carrier does not own the end office.[25] In 2012, numerous parties filed comments on these topics in the CAF proceeding.

In conjunction with these reforms, the *USF/ICC Transformation Order* also adopted rules to address the practice of access stimulation.[26] These rules do *not* subject carriers engaged in access stimulation to mandatory detariffing, but instead require "competitive carriers and rate-of-return incumbent local exchange carriers (LECs) to refile their interstate switched access tariffs at lower rates if the following two conditions are met: (1) a LEC has a revenue sharing agreement and (2) the LEC either has (a) a three-to-one ratio of terminating-to-originating traffic in any month or (b) experiences more than a 100 percent increase in traffic volume in any month measured against the same month during the previous year."[27] The rate reduction requirements

[23] *Id.* ¶ 1297.

[24] *Id.* ¶ 1297.

[25] *Id.* ¶ 1310.

[26] *Id.* ¶¶ 33 & 656 *et seq*.

[27] *Id.* ¶ 33; *see also* 47 CFR § 61.3(bbb). Specifically, if the conditions are met, a LEC subject to the rules "must reduce its interstate switched access tariffed rates to the rates of the price cap LEC in the state with the lowest rates, which are presumptive consistent with the Act." *USF/ICC Transformation Order*, ¶ 657.

apply to all switched access rate elements assessed on access stimulated traffic, including tandem switching and tandem-switched transport, where the carrier providing such services is itself engaged in access stimulation,[28] as defined in 47 C.F.R. § 61.3(bbb).[29] Crucially, however, the Commission was careful to ensure that "[t]hese new rules are ***narrowly tailored*** to…***avoid[] burdens on entities not engaging in access stimulation***."[30]

Moreover, the Commission stated that the access stimulation rules adopted "are part of our comprehensive intercarrier compensation reform" and that the "reform will, as the transition unfolds, address remaining incentives to engage in access stimulation."[31] Thus, the Commission explicitly recognized the importance of making any additional reforms to address access stimulation within the context of the CAF proceeding, so that all reforms are made through a holistic approach as the transition unfolds.

As the Commission has yet to issue a decision to address (a) how tandem switching and transport rates should be set where the tandem owner does not own the end office serving the end user customer or (b) any further concerns relating to access stimulation or the rates for 8YY database dips, the public interest demands that the Commission comprehensively and holistically address all such issues in the context of the ongoing CAF proceeding and its huge evidentiary record. The public interest should not be undermined by AT&T's self-serving manipulations to use forbearance as a vehicle to bypass the calculated process of the CAF proceeding and address these significant issues outside of that proceeding's extensive record.

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[28] *See, e.g.*, 47 CFR § 61.26(a)(3) & (g).

[29] All references to "access stimulation" and "access stimulators" herein refer to that term as it is defined in Commission Rule 61.3(bbb), 47 CFR § 61.3(bbb).

[30] *USF/ICC Transformation Order*, ¶ 33 (emphasis added).

[31] *Id.* ¶ 672.

B. The Reforms the Petition Seeks Are Not in the Public Interest Because the Default Rates Permitted Under the Permissive Detariffing Framework Are Just and Reasonable and No Evidence Suggests that Mandatory Detariffing Is Otherwise Necessary

The Commission should also reject AT&T's claim that the mandatory detariffing it seeks, via forbearance, is in the public interest, because the permissive detariffing approach under the *USF/ICC Transformation Order* is working soundly. Indeed, as indicated above, the Commission's initial implementation of the bill-and-keep framework capped intrastate and interstate switched access rates and only transitioned certain terminating switched access rate elements to bill-and-keep. The Commission held that these prescribed rates are "default" tariffed rates, from which its rules permit carriers to deviate by agreement.[32] However, the Commission noted that "should the traffic volumes of a competitive LEC that meets the access stimulation definition substantially exceed the traffic volumes of the price cap LEC to which it benchmarks, we may reevaluate the appropriateness of the competitive LEC's rates and may evaluate whether any further reductions in rates is warranted."[33] Thus, if an IXC does not believe a carrier's tariffed rates are just and reasonable, the IXC can, for example, challenge such rates on a case-by-case basis via a Section 208 complaint proceeding.

However, to date, no IXCs have filed complaints with the Commission alleging such default rates are unjust and unreasonable. Nor have any IXCs filed complaints with the Commission asserting that a switched access provider should charge less than these default tariffed rates. The lack of any such complaints evidences that the default tariffed rates the Commission adopted in connection with permissive detariffing are (1) in the public interest and (2) entirely just and reasonable. Thus, the forbearance relief AT&T seeks is simply not

[32] *See id.* ¶ 812; 47 CFR § 51.905(a).

[33] *USF/ICC Transformation Order,* ¶ 690.

necessary. For these threshold reasons, the public interest demands that the Commission deny AT&T's Petition either summarily or on substantive grounds.

III. THE FORBEARANCE STANDARD AND BURDEN OF PROOF

When a forbearance petition is filed with the Commission pursuant to Section 10(c) of the Communications Act, 47 U.S.C. § 160(c), "the petitioner bears the burden of proof—that is, of providing convincing analysis and evidence to support its petition[.]"[34] This burden of proof, which encompasses "both the burden of production and the burden of persuasion,"[35] obligates the petitioner to prove that:

> (1) enforcement of [the] regulation or provision [at issue] is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; **and**
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.[36]

In determining whether the forbearance request is consistent with the public interest, the Commission is required by Section 10(b) to consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions and enhance competition among telecommunications providers.[37] Moreover, upon receiving a Section 10(c) forbearance

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[34] *Forbearance Procedure Order*, ¶ 20; *see also Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Docket No. 09-135, 25 FCC Rcd. 8622, ¶ 14 (2010).

[35] *Forbearance Procedure Order*, at ¶ 21.

[36] 47 U.S.C. § 160(a) (emphasis added).

[37] 47 U.S.C. § 160(b); *see also Forbearance Procedure Order*, ¶ 2 ("In determining whether forbearance is consistent with the public interest, the Commission…must consider 'whether

petition, the Commission does not have a "burden to justify regulation."[38] Rather, AT&T, as the petitioner, has the burden to demonstrate each part of the above three-part, statutory test.[39]

Before the Commission substantively considers a petition for forbearance, any commenter may—no later than the due date for comments—move for summary denial,[40] and "[a] petition that on its face is incomplete or defective will be summarily denied."[41] "The legal standard for summary denial is whether the petition, viewed in the light most favorable to the petitioner, fails to meet the requirements for forbearance specified in the statute."[42] Under this standard, "a petition [that] does not address an issue at a sufficiently granular level to permit meaningful analysis of whether or not the statutory criteria are met," or that otherwise fails to state a *prima facie* case, is subject to summary denial.[43]

In addition to stating a *prima facie* case, the petitioner must meet its burden to demonstrate the three-part statutory test through "convincing analysis and evidence."[44] This means that the Commission "appl[ies] the forbearance standard to the arguments and evidence in the petition; [the Commission is] under no obligation to consider other arguments that might

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forbearance from enforcing the provision or regulation will promote competitive market conditions.'").

[38] *Forbearance Procedure Order*, ¶ 22.

[39] *Id.* ¶¶ 20-22.

[40] *Id.* ¶ 29; *see also* 47 CFR § 1.56(a).

[41] *Forbearance Procedure Order*, ¶ 27.

[42] *Id.* ¶ 27.

[43] *Id.* ¶ 30; *see also* 47 CFR § 1.54(b) (requiring that "petitions for forbearance must contain facts and arguments which, if true and persuasive, are sufficient to meet each of the statutory criteria for forbearance").

[44] *Forbearance Procedure Order*, ¶ 20.

support forbearance."[45] Moreover, "the petitioner's evidence and analysis must withstand the evidence and analysis propounded by those opposing the petition for forbearance."[46] As demonstrated below, the Petition should be denied summarily or on substantive grounds.

IV. THE PETITION SHOULD BE SUMMARILY DENIED

Even when viewed in the light most favorable to it, AT&T has failed to satisfy its heavy burden of proving each part of the statutory test. Two key reasons demonstrate this. First, the entire Petition lacks the requisite evidence and analysis to support a forbearance request. Second, AT&T's request that the Commission forbear from permissive tariffing rules for carriers *not even engaged in access stimulation*—a request AT&T makes in an unsupported footnote[47]—indisputably fails to "address [the] issue at a sufficiently granular level to permit meaningful analysis of whether or not the statutory criteria are met," as the Commission requires.[48] The Petition should therefore be summarily denied in both respects.

A. The Entire Petition Should Be Summarily Denied, Because It Fails to Meet the Required Evidentiary and Analytical Threshold

The Petition should be summarily denied, because it is devoid of any granular evidence or market analysis, nor does it contain any affidavits or other evidence to support its factual assertions.[49] Indeed, the Petition seeks to rely on several factual assertions made without any citation or support whatsoever.

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[45] *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks, et al.*, WC Docket Nos. 14-192, 11-42, & 10-90, Memorandum Opinion and Order, 31 FCC Rcd 6157, ¶ 8 (2015) ("*USTelecom Forbearance Order*").

[46] *Forbearance Procedure Order*, ¶ 21.

[47] Petition at 15 n.21.

[48] *Forbearance Procedure Order*, ¶ 30.

[49] *See generally* Petition, at 13-23. The Petition also lacks a market analysis or an appendix of supporting data, as required by the Commission's regulations. 47 CFR § 1.54(e).

First, AT&T's request for forbearance from the tariffing of tandem switching and tandem-switched transport access charges whenever calls are sent to or from a third-party engaged in access stimulation fails to meet the evidentiary threshold.[50] The central factual premise of this request—AT&T's claim that "some carriers" have attempted to recoup revenues lost due to the Commission's access stimulation reforms by assessing higher transport charges[51]—is made up entirely of anecdotal claims and hyperbole. Rather than providing a competitive assessment based on granular market data or analysis, as is required to state a *prima facie* case,[52] AT&T merely provides a small number of anecdotes, described in vague terms, from which it attempts to extrapolate a need for across-the-board forbearance for providers of tandem switching and tandem-switched transport.[53]

Moreover, these anecdotes are unsupported by any affidavit or other evidence. For example, while AT&T alleges that "access stimulation LECs have been able to continue their schemes by billing inflated transport charges,"[54] it provides no citation or support and does not state what the supposedly "inflated" charges are.[55] Likewise, while AT&T alleges that some LECs have "increas[ed] both their traffic volumes and their transport charges (or shifted toward originating access schemes),"[56] it did not identify the LECs to which it is referring or to what

[50] Petition at 13-18.

[51] *Id.* at 15.

[52] *See* 47 CFR § 1.54(e) (requiring a petition for forbearance to include an appendix that lists "[a]ll supporting data upon which the petition intends to rely, including a market analysis").

[53] *See, e.g.,* Petition at 15-17.

[54] *Id.* at 15.

[55] *Id.*

[56] *Id.* at 16.

extent volumes or transport charges have supposedly increased. Nor does AT&T provide any quantitative or qualitative analysis describing the market impact of these alleged increases.[57]

AT&T also fails to provide any evidence for its allegation that the volumes of certain LECs are "three to eight times greater" than the largest price cap LEC in the same state, nor any explanation as to why that purported fact somehow renders tariffing requirements unnecessary on a market-wide basis.[58] By analogy, if such an unsubstantiated filing were submitted as a Section 208 formal complaint, it would be rejected as defective.[59] The same principles apply to survive a summary denial, as otherwise the Commission would be forced to unnecessarily expend resources to address unsupported forbearance requests.

Second, AT&T's request that the Commission forbear from rules that permit tariffed charges for 8YY database dips lacks the requisite support. While the Petition suggests that negotiated prices for database dips are "generally (i) more uniform; and (ii) lower than the tariffed rates billed by many LECs,"[60] AT&T again provides no evidentiary support or citation for this proposition. Indeed, nowhere in the Petition does AT&T analyze what the level of negotiated prices for such services actually are, nor does it show how negotiated prices compare

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[57] *Id*.

[58] *Id.* at 15. Tellingly, AT&T's Petition fails to acknowledge the fact that the Commission previously addressed this very issue in the *USF/ICC Transformation Order* when it stated "should the traffic volumes of a competitive LEC that meets the access stimulation definition substantially exceed the traffic volumes of the price cap LEC to which it benchmarks, we may reevaluate the appropriateness of the competitive LEC's rates and may evaluate whether any further reductions in rates is warranted." *USF/ICC Transformation Order*, ¶ 690. As indicated elsewhere, AT&T has the right to challenge the appropriateness of a competitive LEC's rates that benchmarks to the lowest price cap LEC interstate rates by filing a Section 208 complaint; however, AT&T has not done so.

[59] *See* 47 CFR § 1.720(g) (in a complaint proceeding, "[f]acts must be supported by relevant documentation or affidavit."); *id.* at § 1.728(b) ("Any…pleading filed in a formal complaint proceeding not in conformity with the requirements of the applicable rules in this part may be deemed defective.")

[60] Petition at 19.

to tariffed rates on an overall market basis. AT&T also fails to analyze the context of the individual rates to which it points, providing no basis to assume whether the isolated comparison of different carriers' rates is meaningful. As such, AT&T fails to provide any granular analysis showing how the market would be impacted if 8YY database services were suddenly detariffed.

Where the Petition does contain citation, it largely refers to pieces of the record proceeding referenced in the *USF/ICC Transformation Order*, in which the Commission's recent intercarrier compensation reforms and existing access stimulation rules were adopted.[61] But such references, combined with the unsupported and anecdotal assertions summarized above, do not amount to an assessment of the market demonstrating that current circumstances negate the need for the existing regulatory regime.

Moreover, AT&T conveniently overlooks the fact that upon review of the very evidence that the Petition relies on, the FCC expressly decided in the *USF/ICC Transformation Order* not to mandatorily detariff the switched access charges that the Petition requests be detariffed. This demonstrates that AT&T's requests were inappropriate then and, based on the same evidence, remain inappropriate now. Stated differently, AT&T's Petition is effectively a belated petition for reconsideration of the *USF/ICC Transformation Order* that should not be tolerated. Since AT&T therefore fails to establish the statutory criteria based on "sufficiently granular" evidence and market analysis not otherwise plucked from the *USF/ICC Transformation Order* (which the FCC already considered and ruled on), the Petition should be summarily denied for this reason alone.

[61] *USF/ICC Transformation Order*, ¶¶ 3 & 656 *et seq*.

B. The Forbearance Request Relating to Carriers Not Even Engaged in Access Stimulation Should Be Summarily Denied, Because the Petition is Devoid of Evidence or Analysis for that Request

The Petition also seeks relief that is far broader in scope than the purported problem AT&T claims to exist. While the Petition asserts that carriers engaged in access stimulation are attempting to recoup lost end-office switching revenues by increasing transport charges,[62] the Petition seeks broad "forbearance of the tariffing requirements for transport and tandem charges for calls to and from access stimulating LECs,"[63] "***even if [the tandem provider] LEC is not itself engaged in access stimulation***."[64] The Petition offers no evidence or analysis whatsoever to support such expansive relief, and, in fact, only raises this request in a footnote.[65]

In other words, while AT&T's rationale for forbearance is based on purported conduct of certain carriers engaged in access stimulation, the Petition requests forbearance from tariffing requirements for tandem switching and tandem-switched transport providers that are ***not even involved*** in any access stimulation arrangement.[66] Without any evidence—much less any granular analysis—demonstrating why such forbearance is necessary, the Commission should summarily deny AT&T's Petition as it relates to tariffed charges assessed by tandem switching and tandem-switched transport providers that are not engaged in access stimulation.

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[62] Petition at 15 and Appendix A.

[63] *Id.* at 15 (emphasis added).

[64] *Id.* at 15 n.21 (emphasis added); *see also id.* at Appendix A (seeking forbearance from rules as applied to "[a]ll LECs, including intermediate LECs and centralized equal access ("CEA") providers, on calls originated by or terminated to LECs engaged in access stimulation, as defined in 47 C.F.R. § 61.3(bbb)").

[65] *See id.* at 15 n.21 (containing no citation to an evidentiary source).

[66] Notably, the Commission intentionally avoided such result when adopting its existing access stimulation rules, stating that the rules are "narrowly tailored to…avoid[] burdens on entities not engaged in access stimulation." *USF/ICC Transformation Order*, ¶ 33.

V. EVEN IF THE PETITION WERE NOT SUMMARILY DENIED, IT SHOULD BE DENIED ON SUBSTANTIVE GROUNDS

A. The Petition Fails to Satisfy the Statutory Criteria for Its Request to Forbear from Rules that Permit Permissive Tariffing of Tandem Switching and Tandem-Switched Transport Access Charges on Calls to and from Third-Party LECs Engaged in Access Stimulation, Even Where the Tandem Provider Is Not Engaged in Access Stimulation

While AT&T's Petition utterly fails to meet the evidentiary and analytical threshold to avoid summary denial, the forbearance theories AT&T's asserts, even if considered substantively, also fail. As shown above, a Section 10(c) forbearance petition that fails to meet all three criteria of the statutory test must be denied. As demonstrated below, AT&T's Petition does not satisfy any of them. In fact, the case against the requested forbearance is overwhelming.

1. First Statutory Criterion: The Petition fails to show that such permissive tariffing rules are not necessary to ensure charges and practices remain just and reasonable and not unjustly and unreasonably discriminatory.

The Petition fails to satisfy the first statutory criterion. As indicated above, this criterion requires the petitioner to demonstrate that enforcement of the rule at issue "is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory."[67] For this part of the test, the petitioner must show that no "current need" exists for the rules at issue.[68] Thus, AT&T had the burden to show that the Commission's rules allowing permissive tariffing of charges for tandem switching and tandem-switched transport services that deliver or receive calls to or from LECs engaged in access stimulation, as defined in FCC Rule 61.3(bbb)—*even if the tandem switching or transport*

[67] 47 U.S.C. § 160(a)(i).

[68] *USTelecom Forbearance Order*, ¶ 8.

providers are not engaged in access stimulation[69]—are not necessary to ensure that rates and practices remain just and reasonable and not unjustly and unreasonably discriminatory.

As an initial matter, AT&T failed to meet its burden, which encompasses "both the burden of production and the burden of persuasion,"[70] because the Petition lacks "convincing analysis and evidence" to establish that there is no current need for the permissive tariffing rules in the situations at issue. As discussed Section IV.A. above, the Petition does not include any overall market analysis, but instead attempts to rely on anecdotal descriptions of alleged arbitrage that AT&T claims to have encountered, *all of which* are unsupported by affidavit or other evidence.[71] Even if such assertions could be accepted as fact (which they should not be, as discussed above), they do not amount to proof that the permissive tariffing rules are not necessary on a market-wide basis. Nor does the Petition contain "sufficiently granular" evidence and market analysis not otherwise self-servingly pulled from the *USF/ICC Transformation Order* that the FCC already considered and ruled on. The Petition also fails to provide any convincing analysis or evidence as to why the proposed forbearance should apply to a provider of tandem switching and tandem-switched transport that is "not itself engaged in access stimulation."[72]

At best, the Petition merely describes a few encounters that, if truly problematic, could be addressed on a case-by-case basis in a Section 208 complaint proceeding. Contrary to AT&T's

[69] *See* Petition at 15 n.21 and Appendix A.

[70] *Forbearance Procedure Order*, ¶ 21.

[71] *See* Discussion at Section IV.A. *supra.*

[72] Petition at 15 n.21.

claims, the mere existence of relatively few disputes, which the Petition references in passing,[73] does not *ipso facto* demonstrate a need for nationwide forbearance from permissive tariffing and the establishment of mandatory detariffing in all instances where a provider of tandem switching or tandem-switched transport happens to handle traffic of a third-party engaged in access stimulation.

Moreover, the permissive tariffing rules at issue *are necessary* to ensure rates and practices associated with tandem switching and tandem-switched transport services are just and reasonable. If these services were subject to mandatory detariffing while the rest of the intercarrier compensation regime were left intact—which is exactly what the Petition proposes[74]—IXCs would have dramatically increased negotiation strength with no incentive whatsoever to negotiate a reasonable rate. Consequently, IXCs would attempt to use the absence of a tariff to avoid payment altogether, which would prevent providers of tandem switching or tandem-switched transport from recovering a just and reasonable rate.

This already has borne true in practice in related circumstances. Where IXCs have challenged the enforceability of specific switched access tariffs, they often aggressively dispute and, in many cases, engage in self-help by refusing to pay any amount for the switched access charges under dispute, requiring switched access providers to seek payment through collection actions.[75] In the collection actions, which are further discussed in Section VI below, complaints

[73] Relatedly, to our knowledge, *no IXC* has filed a formal complaint with the FCC that challenges the default switched access charges that may be assessed pursuant to tariff that the Commission adopted in the *USF/ICC Transformation Order*.

[74] Petition at 16 n.22.

[75] As an illustrative example of the litigation that results when an IXC refuses to pay for services provided, a recent motion to dismiss filed in federal district court by AT&T is attached to this Response. AT&T Corporation's Motion to Dismiss in Part Plaintiff's Complaint; Memorandum of Points and Authorities in Support, Case No. 3:16-cv-01452-VC, Doc. 22 (N.D. Cal., filed Apr. 26, 2016) (attached hereto as "Exhibit A").

typically include both breach of tariff and state law claims for recovery, under theories such as unjust enrichment, quantum meruit, and implied contract.[76] However, IXCs have recently been successful in dismissing these alternative claims under the argument that any non-tariffed rate may only be collected under a negotiated agreement.[77] Thus, if IXCs are also successful in challenging the tariff, the IXCs receive a windfall—*i.e.*, they effectively obtain the services for free.

Moreover, similar gamesmanship of intercarrier compensation rules occurred under the former regime governing the exchange of intraMTA traffic between LECs and Commercial Mobile Radio Service ("CMRS") providers. Under those former rules, a CMRS provider was required to pay "reasonable compensation" to a LEC in connection with terminating traffic originating on the network of the CMRS provider, and vice versa.[78] While many LECs filed state tariffs that included wireless termination charges as a way to impose the "reasonable compensation" obligation on CMRS providers, the Commission issued its *T-Mobile Order* in 2005, which found that intraMTA traffic should not be billed pursuant to tariffs.[79] Instead, the *T-Mobile Order* indicated a preference for these issues to be resolved through commercial

[76] *See, e.g.*, Exhibit A at 10-15.

[77] *See Peerless Network v. MCI Commc'ns Servs*., No. 14-C-7417, 2015 WL 2455128, at *8-10 (N.D. Ill. May 21, 2015) (holding that the filed rate doctrine bars recovery for service provided under equitable claims in the absence of a tariff or negotiated agreement); *see also Qwest Commc'ns v. Aventure Commc'ns Tech*., No. 4:07-cv-00078-JEG, 2015 WL 711154, at *79-82 (S.D. Iowa Feb. 17, 2015); *XChange Telecom v. Sprint Spectrum*, No. 1:14–cv–54 (GLS/CFH), 2014 WL 4637042, at *6 (N.D. N.Y. Sept. 16, 2014); *Connect Insured Tel. v. Qwest Long Distance*, No. 3:10–CV–1897–D, 2012 WL 2995063, at *12 (N.D. Tex. July 23, 2012).

[78] *See* 47 CFR § 20.11(b) (2005).

[79] *Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, CC Docket No. 01-92, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855, ¶ 9 (2005) ("*T-Mobile Order*") (subsequent history omitted).

negotiations, while at the same time all intraMTA traffic remained subject to the "reasonable compensation" obligation in the absence of an agreement.[80]

Following issuance of the *T-Mobile Order*, however, many of the major CMRS carriers maintained that as long as there was no agreement in place, no compensation was owed.[81] Consequently, many LECs had difficulty negotiating agreements with CMRS providers, with efforts often leading to protracted negotiations and, in many cases, litigation before federal courts and the Commission.[82] Ultimately, the Commission determined that default "reasonable compensation" rates should be set by state commissions.[83] However, this decision led to highly contested, drawn-out state commission proceedings, during which LEC efforts to collect any charges from CMRS providers were stymied.[84]

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[80] *Id.* ¶ 9 (noting the Commission's "preference for contractual arrangements").

[81] *See, e.g.*, Memorandum of Law of Defendants in Support of Motion to Dismiss, at 1, *Manhattan Telecommunications Corporation v. Cellco Partnership*, Case 1:09-cv-02409-RJS (S.D. N.Y. filed June 19, 2009) (arguing that the *T-Mobile Order* required reasonable compensation arrangements to "be determined exclusively by privately negotiated agreements" and seeking to dismiss state law claims for recovery); Response of Cellco Partnership d/b/a Verizon Wireless to Informal Complaint, at 2, *Informal Complaint of Line Systems, Inc. v. Cellco Partnership, et al.*, File No. EB-11-MDIC-0003 (F.C.C. filed July 12, 2011) (indicating that no payment was made due to the purported inability of the parties to reach a negotiated traffic exchange agreement); *see also North County Communications Corp. v. California Catalog & Technology*, 594 F.3d 1149 (9th Cir. 2010) (holding that FCC regulation did not provide CLECs with a private right of action to seek recovery of reasonable compensation in federal court).

[82] *See* n.81 *supra*; *see also PaeTec Communications, Inc. v. Cellco Partnership*, Civil Action No. 07-821 (MLC), 2007 WL 2300775, at *2 (D. N.J. Aug. 7, 2007) (referring issues concerning the identification of interMTA and intraMTA traffic to the Commission under the doctrine of primary jurisdiction).

[83] *North County Communications Corp., Complainant, v. MetroPCS California, LLC, Defendant.*, File No. EB-06-MD-007, Order on Review, 24 FCC Rcd 14036, ¶ 1 (2009) (finding that "North County must first obtain from the California Public Utilities Commission…a determination of a reasonable rate for North County's termination of intrastate, intraMTA traffic originated by MetroPCS"), *aff'd sub. nom. MetroPSC California, LLC v. FCC*, 644 F.3d 410 (D.C. Cir. 2011).

[84] *See, e.g., Application of North County Communications Corporation of California (U5631C) for Approval of Default Rate for Termination of Intrastate, IntraMTA Traffic Originated by CMRS Carriers*, A.10-01-003, D.12-03-027, Order Denying Rehearing of Decision (D.) 10-06-

A similar result should be expected between IXCs and affected providers of tandem switching and tandem-switched transport if this Petition were granted. Indeed, if such providers were suddenly subject to mandatory detariffing (possibly due solely to the actions of a third-party access stimulator), IXCs would (1) have dramatically increased negotiation strength with no incentive to enter into negotiated agreements with such providers for such services at any rates, let alone reasonable rates and (2) seek to avoid exposure under state law theories of recovery by asserting that such claims are preempted by the federal regulatory regime that requires entry of a negotiated agreement. Moreover, because IXCs have been fairly successful in dismissing state law claims on preemption grounds under the current regulatory regime, as noted above,[85] IXCs would be far more emboldened to avoid entering negotiated arrangements if the requested forbearance were granted. Relatedly, when the Commission gave IXCs the right to permissively tariff "dial-around" services, it held that such permissive tariffing was in the "public interest" due to concerns of establishing "enforceable contract[s]."[86] The same concern holds true here. Therefore, the current permissive tariffing rules indisputably remain necessary.

Permissive tariffing rules are also necessary to provide a level playing field for competitive providers of tandem switching and tandem-switched transport. For example, the rates of such competitive providers that do not serve end users are generally disadvantaged vis-à-

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006, 2012 WL 868973 (Cal. P.U.C. Mar. 8, 2012); *Complaint of Xchange Telecom, Inc. Against Sprint Nextel Corporation for Refusal to Pay Terminating Compensation*, Cases 07-C-1541 & 09-C-0370, Order Denying Requests for Rehearing and Granting Request for Rehearing in Part and Denying in All Other Respects, 2012 WL 1066421 (N.Y. P.S.C. Feb. 17, 2012).

[85] *See* n.77 *supra.*

[86] *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-91, Order on Reconsideration, 12 FCC Rcd 15014, ¶¶ 32-33 (1997) ("*1997 Order on Reconsideration of Mandatory Detariffing of Nondominant IXC Services*") (subsequent history omitted); *see also* 47 CFR § 61.19(b) (mandatorily detariffing all nondominant carrier interstate and international, long distance services, other than dial-around 1+ services, and certain other services and calls).

vis their ILEC competitors when operating under rate caps, given that ILECs can recover tandem switching and tandem-switched transport costs through their charges to end-users while such competitive tandem providers cannot.[87] Competitive tandem switching and tandem-switched transport providers also often face high collection costs, given that IXCs often seek to aggressively dispute and withhold switched access charges, forcing the tandem and transport providers to expend resources on dispute resolution and legal fees.[88] Permissive tariffing is thus crucial to ensure such providers are able to operate efficiently. At the same time, however, alternative tandem and transport services and the availability of direct trunking places downward pressure on tariffed rates, ensuring that tariffed rates must be competitive with those alternatives.[89]

Furthermore, the forbearance requested is wholly unnecessary, because the Commission's existing rules already ensure that rates for tandem switching and tandem-switched transport are just and reasonable. As AT&T even acknowledges, the tariffed switched access rates of CLECs that offer competitive tandem switching and transport are capped.[90] Further,

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[87] *See USF/ICC Transformation Order*, ¶¶ 737 & 1312.

[88] *See* nn.75-77 and accompanying text *supra.*

[89] Contrary to AT&T's unsupported claims (Petition at n.20), because AT&T can obtain direct connections and avoid tandem switching and tandem-switched transport charges altogether, there is no need for the Commission to forbear from its tariffing rules. Establishing direct connections is a simple solution for AT&T, because the charges for dedicated facilities are typically lower than what the charges would be to route high-volume traffic using tandem switching and tandem-switched transport services on a per minute-of-use basis. Moreover, AT&T's claims that carriers could simply shift their traffic to carriers that continue to offer high tariffed charges for tandem-switching and transport is nonsensical, because the traffic at issue would be going to or from the same LEC. AT&T has not provided any evidence or analysis showing that obtaining direct trunking does not provide a workable solution that would obviate the purported, but unsubstantiated "need" for the detariffing it seeks.

[90] Petition at 5; 47 C.F.R. § 61.26; *see also AT&T Services, Inc. and AT&T Corp. v. Great Lakes Comnet, Inc. and Westphalia Telephone Company*, File No. EB-14-MD-013, Memorandum

when such carriers engage in access stimulation, their tariffed rates are already automatically detariffed unless reduced to the lowest rate assessed by any price cap ILEC in the same state.[91] Thus, to the extent the Petition claims that such carriers engaged in access stimulation are increasing tandem switching and tandem-switched transport rates above such levels, the Commission's existing rules already provide AT&T with a basis to challenge those rates via a section 208 complaint.[92]

Lastly, the Petition also fails to satisfy AT&T's burden that the permissive detariffing regime is no longer necessary to avoid unjust and unreasonable discrimination. In fact, this burden cannot be met, because the requested forbearance would itself result in such discriminatory treatment of tandem switching and tandem-switched transport providers. Specifically, if the Petition were granted, then any such providers that happen to deliver or receive traffic to or from a third-party access stimulator would be subject to mandatory detariffing, even if the provider is not itself engaged in access stimulation. However, if a tandem or transport provider *is* engaged in access stimulation, but does not deliver or send traffic to a LEC engaged in access stimulation, then it would *not* be subject to mandatory detariffing; instead, it would be permitted to continue to assess tariffed rates equal to "the rate prescribed in

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Opinion and Order, 30 FCC Rcd 2586, ¶ 20 (2015), *aff'd in rel. part, remanded on other grounds, sub. nom. Great Lakes Comnet, Inc. v. FCC*, 83 F.3d 998 (D.C. Cir. 2016).

[91] 47 CFR § 61.26(g) (providing that "[a] CLEC engaged in access stimulation…shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the access tariff of the price cap LEC with the lowest switched access rates in the state").

[92] As indicated in n.73 *supra*, to our knowledge, *no IXC* has filed a formal complaint with the FCC that challenges the default tandem switching and tandem-switched transport charges that may be assessed pursuant to tariff that the Commission adopted in the *USF/ICC Transformation Order*.

the access tariff of the price cap LEC with the lowest switched access rates in the state."[93] The Petition offers no explanation or analysis as to why treating carriers that *are* engaged in access stimulation so differently from those that are *not* would be non-discriminatory. Nor does the Petition, if granted, address the unjust and unreasonable discrimination against providers of competitive tandem services, which do not have the scale and scope of the affiliates of AT&T and other IXCs that provide competing switched access services, that would likely result.

In short, the Petition is woefully insufficient to carry AT&T's burden of proof that permissive detariffing of tandem switching and tandem switched transport it requests is no longer necessary to ensure that charges and practices are just and reasonable and are not unjustly and unreasonably discriminatory.

2. <u>Second Statutory Criterion</u>: The Petition fails to show that such permissive tariffing rules are not necessary for the protection of consumers.

The Petition also does not satisfy the second statutory criterion, which requires the petitioner to demonstrate that enforcement of the rules at issue "is not necessary for the protection of consumers."[94] As with the first criterion, the Commission must consider whether there is a "current need" for the rule to protect consumers,[95] and as such the analysis under the second criterion often overlaps with the first.[96] Thus, for many of the same reasons the Petition fails to meet the first criterion, it fails to meet the second one as well. Indeed, as indicated in

[93] 47 CFR § 61.26(g).

[94] 47 U.S.C. § 160(a)(2).

[95] *See USTelecom Forbearance Order*, ¶ 8 ("In evaluating whether a rule is 'necessary' under the first two prongs of the three-part section 10 forbearance test, the Commission considers whether a current need exists for a rule. In particular, the current need analysis assists in interpreting the word 'necessary' in sections 10(a)(1) and 10(a)(2).").

[96] *Verizon v. FCC*, 770 F.3d 961, 964 (D.C. Cir. 2014) (noting that "there is a great deal of overlap in the three factors").

Section V.A.1., above,[97] the Petition fails to meet its burden to establish that the permissive tariffing rules are not necessary through "convincing evidence and analysis."[98]

Further, while the Petition cites to the *USF/ICC Transformation Order* as somehow supporting the proposition that the activity AT&T complains of imposes increased costs on consumers,[99] the CAF proceeding did not investigate whether arbitrage extended to third-party providers of tandem switching and tandem-switched transport through which traffic is sent to or from LECs engaging in access stimulation, as defined in FCC Rule 61.3(bbb). To the contrary, the *USF/ICC Transformation Order* specifically found that any access stimulation rules should be "narrowly tailored to … ***avoid[] burdens on entities not engaging in access stimulation***."[100] Thus, while the Petition relies almost exclusively on the underlying record from that proceeding as support for its rationale,[101] the Commission's decision resulting from that record ***specifically declined*** to grant the broad relief that the Petition seeks.[102]

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[97] *See* Section V.A.1. *supra*.

[98] *Forbearance Procedure Order*, ¶ 20.

[99] Petition at 16-17.

[100] *USF/ICC Transformation Order*, ¶ 33.

[101] *See* Petition at 16-17.

[102] *USF/ICC Transformation Order*, ¶ 672 ("Nor do we find that parties have demonstrated that traffic directed to access stimulators should not be subject to tariffed access charges in all cases. We note that the access stimulation rules we adopt today are part of our comprehensive intercarrier compensation reform. That reform will, as the transition unfolds, address remaining incentives to engage in access stimulation."). AT&T's biggest dispute seems to be with its own policy of providing customers with flat rate unlimited long distance usage plans, which allow certain customers to use long distance services to access free conferencing or similar services. In this sense, because AT&T can offer higher per-minute usage-based long distance calling plans rather than flat-rate, unlimited usage plans to prevent low-volume callers from having to "subsidize" high-volume callers that use unlimited usage plans, any such subsidization is in reality a result of AT&T's own formulated business plan. Indeed, if AT&T did not want such subsidization taking place, AT&T could eliminate its unlimited plan for high-volume users. In this regard, AT&T's request for forbearance is a transparent attempt to profiteer, because it is seeking to increase its revenues by reducing its cost to access the networks of other providers

In any event, permissive tariffing protects consumers for a variety of reasons. In fact, in a permissive tariffing environment, consumers have more protections (as compared to a mandatory detariffed environment) because they have their choice of the most efficient mix of tariffing and contracting with carriers. Permissive tariffing also reduces the charges consumers pay for services, whereas mandatory detariffing would drastically increase such charges. For instance, offering services via a tariff allows providers to reduce transaction costs by obviating the need for individual contracts where a particular service or certain terms and conditions may be standardized.

Along with protecting consumers, permissive tariffing benefits consumers as well. Carriers have the flexibility to react to changes in the market more rapidly and initiate new products and services without having to renegotiate every contract. As a result, consumers are able to obtain new products and services faster. Moreover, consumers benefit from tariffs because they provide concise information about carrier rates and terms to the public, enabling customers to make informed choices after comparing products and services.

That said, apart from being ill supported, the forbearance requested would deprive consumers of the above-referenced protections and benefits. It is therefore clear that AT&T's motive in seeking forbearance is not for the protection of consumers. Indeed, AT&T makes no demonstration that any forbearance would result in lower rates to its end-users, and AT&T makes no commitment to do so. Instead, AT&T seeks only to profiteer by avoiding payments to providers of tandem switching and tandem-switched transport services. As such, the Petition fails to demonstrate that the permissive detariffing of tandem switching and tandem-switched transport is not necessary to protect consumers.

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when providing services to high-volume users of unlimited plans or with otherwise very low per minute of use rates, which could be raised.

3. Third Statutory Criterion: The Petition fails to show that forbearance from applying such permissive tariffing rules is consistent with the public interest.

Finally, the Petition fails to satisfy the third statutory criterion, which requires a petitioner to demonstrate that "forbearance from applying [the rules at issue] is consistent with the public interest."[103] This prong of the test requires the Commission "to consider whether forbearance is consistent with the public interest, an inquiry that also may include other considerations"[104]—including "whether forbearance will promote competitive market conditions."[105] The Petition fails to satisfy this prong for multiple reasons.

First, as discussed in Section II above, the public interest demands that any reforms to the regime under which charges for tandem switching, tandem-switched transport, and other switched access services are assessed be addressed comprehensively within the context of the CAF proceeding, rather than a forbearance proceeding. Moreover, as also discussed above, while the Petition cites almost exclusively to the record of the CAF proceeding, the Commission specifically declined to grant the relief that AT&T seeks when that record was considered. Indeed, as noted, the *USF/ICC Transformation Order* did not even subject carriers *engaged* in access stimulation to mandatory detariffing, but rather imposed certain rate limitations on them. The Commission also declined to impose the bill-and-keep transition on tandem switching and tandem-switched transport rate elements where the tandem owner does not own the end office, in recognition of the fact that tandem owners in such circumstances cannot look to end-users to pay for tandem switching and tandem-switched transport services.[106] Because issues and rates

[103] 47 U.S.C. § 160(a)(3).

[104] *USTelecom Forbearance Order*, ¶ 8.

[105] *Id.* ¶ 10.

[106] *USF/ICC Transformation Order*, ¶ 737.

relating to such services remain open and under consideration in the CAF proceeding, in which they will be considered through a comprehensive and holistic approach in conjunction with all other inter-related issues, the granting of forbearance with respect to individual issues is not in the public interest.

Second, as with the other statutory criteria, the Petition fails to carry AT&T's burden of proof that the requested forbearance is in the public interest. As discussed above, while the Petition attempts to rely on anecdotal claims that some unidentified tandem providers have engaged in arbitrage, the Petition provides no evidentiary support for such assertions.[107] Further, the Petition contains an analytical gap, as it offers no explanation as to why it would somehow be in the public interest to impose mandatory detariffing on a providers of tandem switching and transport that are not even engaged in access stimulation.[108]

Third, the requested forbearance is demonstrably ***not*** consistent with the public interest for many of the same reasons already discussed at length under the other parts of the statutory test. As explained above, the imposition of mandatory detariffing on providers of tandem switching and tandem-switched transport would disadvantage these providers by increasing their transaction costs and incentivize IXCs to avoid entering a negotiated agreement or protracting negotiations to obtain services for free in a detariffed environment.[109] Providers of tandem switching and transport services could be forced out the market or may otherwise stop offering such services if they are unable to recover payments for the services they provide. Such a result would harm the public interest by diminishing competition in the tandem and transport services market, thereby undermining the many public interest benefits that such services provide.

[107] *See* Petition at 17-18.

[108] *See id.* at 17-18 & 15 n.21.

[109] *See* Section V.A.1. *supra*.

Similarly, the requested forbearance, if granted, may cause price cap ILECs—which are not subject to the Commission's existing access stimulation rules[110]—to be reluctant to provide tandem switching and transport services to non-price cap ILECs or CLECs, because doing so would expose price cap ILECs to risk of mandatory detariffing in the event a third-party LECs engages in access stimulation. The potential for such consequences reinforces the need for such issues to be addressed, if at all, within the context of the CAF proceeding.

Finally, from a logistical standpoint, the requested forbearance is problematic and thus inconsistent with the public interest. For instance, the Petition seeks to impose mandatory detariffing on any providers of tandem switching or tandem-switched transport that deliver or receive traffic to or from a third-party LEC engaged in access stimulation—even if the tandem and transport providers are not engaged in access stimulation. The Petition does not explain, however, how providers that do not engage in access stimulation would know that a LEC routing calls to or from their network *is in fact* engaged in access stimulation. As a result, the tandem and transport providers would be vulnerable to risk when relying on their tariff, especially where large IXCs aggressively withhold charges under allegations concerning a third-party's conduct. This, in turn, would increase transaction costs and legal fees of tandem and transport providers, resulting in higher prices and reduced competition in the tandem and transport market. Such results are not at all in the public interest.

For these reasons, AT&T's request that the Commission forbear from the tariffing requirements for tandem switching and tandem-switched transport access charges on calls to or from LECs engaged in access stimulation fails to satisfy the three statutory requirements. AT&T's request must therefore be denied.

[110] 47 CFR § 61.3(bbb).

B. The Petition's Request to Forbear from Rules Permitting Tariffed Charges for 8YY Database Dips Also Fails to Meet the Statutory Criteria

The Petition's request to forbear from rules permitting tariffed charges for 8YY database dips also fails to meet the three statutory criteria. As shown below, because the Petition fails to meet AT&T's burden as to each of them, this aspect of the Petition should likewise be denied.

1. First Statutory Criterion: The Petition fails to show that permissive tariffing of charges for 8YY database dips is not necessary to ensure such charges remain just and reasonable and not unjustly and unreasonably discriminatory.

The Petition fails to satisfy AT&T's burden to demonstrate that permissive tariffing of charges for 8YY database dips is not necessary to ensure that such charges remain just and reasonable and not unjustly and unreasonably discriminatory. While the Petition claims that the requested forbearance is necessary to prevent high charges, the Petition provides no evidence showing that existing tariff rates are unreasonable. In fact, the only evidence relating to existing rates is one footnote that purports to describe the tariffed rates of a few LECs,[111] but such scant evidence does not amount to a market analysis of the type required to support a forbearance Petition.[112] At best, the Petition merely identifies a few rates that could be challenged as unreasonable on a case-by-case basis in a Section 208 complaint proceeding, to the extent an IXC had any underlying evidence to demonstrate such a claim.

Moreover, permissive tariffing of 8YY database dip charges is necessary to ensure such charges are just and reasonable and are not unjustly and unreasonably discriminatory. As discussed above, if these services were subject to mandatory detariffing, IXCs would (a) have dramatically increased negotiation strength, (b) have little incentive to negotiate a reasonable rate, if any, and (c) likely attempt to forestall negotiations in order to avoid payment, which, in

[111] Petition at 19 n.29.

[112] *Forbearance Procedure Order*, ¶¶ 20-22.

turn, would likely also prompt unjust and unreasonably discriminatory conduct.[113] In similar regulatory environments, negotiation of agreements has proven extremely difficult, with resulting litigation driving up transaction costs.[114] Such costs ultimately must be recovered by carriers from end users, where possible, thereby increasing the charges consumers must pay for services. Even worse, tandem providers that do not serve any end-users would be even further squeezed in terms of competitive market position, disadvantaging them vis-à-vis tandem providers that do serve end-users, such as AT&T's ILEC affiliates. The Petition therefore fails to meet the first criterion of the statutory test.

2. <u>Second Statutory Criterion</u>: The Petition fails to show that permissive tariffing of charges for 8YY database dips is not necessary for protection of consumers.

For the same reasons described above, the Petition fails to meet its burden of proof to show that permissive tariffing of charges for 8YY database dips is not necessary for the protection of consumers. In addition, the forbearance request fails to consider why permissive tariffing of 8YY database dip charges *remains necessary* to protect consumers.

In this connection, 8YY services are designed so that the customer of the service—*i.e.*, the party receiving the call—pays all charges associated with the service, allowing the caller to make the call without paying, or "toll-free." The permissive tariffing regime thus ensures that carriers performing the 8YY database dips are justly and reasonably compensated for handling traffic on behalf of the provider serving the 8YY end-user customer, in order to allow such calls to be placed on a "toll-free" basis.

[113] *See* Section V.A.1. *supra*.

[114] *See id.*

If charges for 8YY database dips were mandatorily detariffed, IXCs would seek to avoid paying these charges through protracted negotiations.[115] Moreover, if providers of 8YY database dips are not paid via tariff and experience issues getting paid for the services provided, such providers may decide not to process the 8YY calls. As a result, the 8YY call may not be routed to the IXC and then to the IXC's 8YY consumer. Consequently, 8YY consumers may not receive the requested traffic *despite the fact that they requested toll free services and agreed to pay the charges associated with the call*.

Through its Petition, AT&T transparently seeks to evade paying such charges (and increase its profits), which in turn jeopardizes whether the 8YY traffic will be routed to the consumers. This end result obviously does not protect consumers. Moreover, because AT&T has not committed to lowering its end-user or wholesale 8YY rates, AT&T's real motive for its forbearance proposal is not to benefit or otherwise protect consumers, but rather solely benefit AT&T by giving it further means to increase revenues and reduce its costs via self-help profiteering actions.

3. <u>Third Statutory Criterion</u>: The Petition fails to show that forbearance from permissive tariffing of charges for 8YY database dips is consistent with the public interest.

Finally, the Petition fails to meet AT&T's burden to prove that the requested forbearance is consistent with the public interest. As discussed, the public interest demands that any detariffing of 8YY charges be addressed comprehensively and holistically in the context of the CAF proceeding. Moreover, permissive tariffing of 8YY database dips is crucial to protect the public interest within the context of the existing intercarrier compensation regimes, as tariffs ensure that the customer that ordered 8YY service pays the various charges involved that are

[115] *See id.*

needed to obtain the service. If charges for 8YY database dips were suddenly detariffed without other associated regulatory reform, switched access providers would be at risk of not being compensated for the 8YY database queries.[116] Consequently, such providers may seek to avoid processing or efficiently completing such calls, which in turn could "degrade the reliability of the nation's telecommunications network."[117] The requested forbearance would therefore not promote competition, but instead would threaten to reduce it, which is not in the public interest.

VI. ASSUMING THAT FORBEARANCE WERE GRANTED, THE COMMISSION NEEDS TO SUBJECT ANY SUCH GRANT TO CERTAIN CONDITIONS AND CLARIFICATIONS

The foregoing demonstrates the Commission should deny AT&T's Petition *in toto*. If, however, the Commission were to grant the forbearance that AT&T seeks (which it shouldn't), the Commission should, as explained below, condition such forbearance on an IXC paying a carrier's formerly tariffed switched access rates for tandem switching, tandem-switched transport, and 8YY database dips, if the IXC does not have a negotiated agreement with the carrier for such services. In addition, to prevent IXCs from exploiting the regulatory framework in an attempt to obtain switched access services for free in the absence of a negotiated agreement or tariff, the Commission needs to make certain clarifications described below to ensure IXCs pay for switched access services received and are not allowed to escape this financial responsibility.

A. The FCC Should Condition Any Forbearance Grant on IXCs Paying, in the Absence of a Negotiated Agreement, the Switched Access Provider's Applicable "Formally Tariffed" Rates for Services that Are Expressly Detariffed as a Result of AT&T's Petition

Conditioning any forbearance order on a requirement that IXCs pay, in the absence of a

[116] *See id.*

[117] *2007 Declaratory Ruling*, ¶ 5.

negotiated agreement, the switched access provider's applicable formally tariffed rates is entirely justified and consistent with Commission precedent.[118] In fact, when the Commission established benchmark rates that CLECs could charge via tariff and forbore from allowing CLECs to tariff rates above the benchmark, the FCC held that CLEC "access charges above the benchmark…are mandatorily detariffed and may be imposed only pursuant to a negotiated agreement;" however, "during the pendency of negotiations, or if the parties cannot agree, the competitive LEC must charge the IXC the appropriate benchmark rate."[119]

As a result of the reforms of the *USF/ICC Transformation Order*, the requested condition is abundantly necessary to prevent IXCs from refusing payment in the absence of a negotiated agreement (and therefore effectively obtaining services for free).[120] The IXCs' abusive manipulation of federal law to obtain services for free should be addressed and not be countenanced. To stop such manipulations and the IXCs' abuse of their negotiating strength, the Commission should impose a condition on any forbearance grant, requiring that in the absence of a negotiated agreement with the switched access provider, an IXC "must pay" the switched

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[118] In various instances, the Commission has conditioned a forbearance grant on certain requirements being met. *See USTelecom Forbearance Order*, ¶¶ 46, 55, 72, & Appendix B (2015); *see also id.* at n.37 and 57 (referring to various forbearance decisions issued by the Commission that were conditioned on certain requirements being met).

[119] *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers; Petition of Z-Tel Communications, Inc. for Temporary Waiver of Commission Rule 61.26(d) To Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas*, CC Docket No. 96-262, CCB/CPD File No. 01-19, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, ¶ 4 (2004) (citing *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, ¶ 3 (2001)).

[120] As discussed within Section VI.A.1., some carriers have been successful in dismissing equitable claims for recovery in the absence of a negotiated agreement and history demonstrates that when services are mandatorily detariffed, carriers will attempt to refuse paying for access services received when no such agreement is in place. *See* n.77 and accompanying text *supra.*

access provider's previously tariffed rates for tandem switching, transport and 8YY database queries that are expressly detariffed as a result of AT&T's Petition. Of course, if an IXC believes a carrier's formerly tariffed rates are not just and reasonable, the IXC can—and has always had the right to—challenge them via a Section 208 complaint proceeding.[121]

B. The FCC Should also Clarify that as a Condition of Forbearance: (i) IXCs that Refuse to Pay Switched Access Charges Violate Sections 201 and 202 of the Act and (ii) Switched Access Providers Can Also Recover Such Charges under Alternate State-law Theories, which Are Not Preempted, and that "Formerly Tariffed Rates" for Such Services Constitute a Reasonable Rate for Recovery Under Such Theories.

To further ensure that IXCs do not abuse any forbearance grant as a means of not paying for detariffed switched access services they receive, any forbearance grant must clarify that (a) IXCs that refuse to pay charges for switched access services provided to them are subject to violations of Sections 201 and 202 and (b) switched access service providers are not preempted from recovering such charges under alternate state-law theories, and that "formerly tariffed rates" for such services constitute a reasonable rate for recovery under state-law theories. As demonstrated below, these clarifications are entirely justified and must be imposed on any forbearance grant.

First, the clarification concerning the application of Sections 201 and 202 to IXCs is

[121] In orders previously detariffing services, the Commission has held that the detariffed rates remain such subject to challenge through the "section 208 complaint process." *See Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Memorandum Opinion and Order, 17 FCC Rcd 27000, ¶ 22 (2002); *see also Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended,* CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730, ¶¶ 9, 21, 26, 36, 128 (1996) ("*1996 Order on Mandatory Detariffing of Nondominant IXC Services*") (referencing the Commission's authority to examine conduct in the context of a Section 208 complaint proceeding) (subsequent history omitted); *1997 Order on Reconsideration of Mandatory Detariffing of Nondominant IXC Services*, ¶ 72 (explaining that "[i]f a carrier does not provide [the purchaser] …reasonable rates [for detariffed services], …[the purchaser] also ha[s] the right to file a section 208 complaint with the Commission."); *see also id.* ¶¶ 68, 80.

necessary, because IXCs often claim that self-help withholding is not an "unjust and unreasonable practice" under Section 201 and does not constitute "unjust and unreasonable discrimination" under Section 202.[122] When making such claims, IXCs assert that they are not subject to these provisions of the Communications Act because only the party *providing* a service, and not the party *purchasing* that service, is capable of violating Sections 201 and 202,[123] a violation of which is subject to payment of attorneys' fees.[124] With these arguments, IXCs effectively position themselves to avoid both paying for services and attorneys' fees, which at least one court recently found is plainly contrary to law.[125] Knowing this, if the Commission grants the forbearance that AT&T seeks, the Commission must make it perfectly clear that such forbearance may not be used or relied on in an attempt to avoid paying for services received, and that such non-payment of subjects IXCs to Sections 201 and 202 violations.

Second, the clarification that switched access service providers can recover such charges under alternate state-law theories is necessary, because, as discussed above, many IXCs—in an effort to avoid state law claims made by providers of switched access service that would require IXCs to pay for the switched access services they received—contend that such state law claims are preempted by federal law.[126] To avoid leaving providers of switched access services with no recourse for collection in the absence of a negotiated agreement following any mandatory

[122] *See, e.g.,* Exhibit A at 7.

[123] *See, e.g., id.*

[124] *See* 47 U.S.C. § 206.

[125] *Centurytel of Chatham, LLC v. Sprint Commc'ns Co., L.P.*, No. 09-1951, 2016 WL 2347926, at *12 (W.D. La. May 4, 2016) (holding that an IXC's failure to pay for switched access services provided was an unjust and unreasonable under 201), *appeal pending,* Case No. 16-30634 (5th Cir. filed June 7, 2016).

[126] *See* Petition at 16 n. 22; *see also* n.77 *supra* (listing cases) & Exhibit A at 2 & 11.

detariffing, the Commission must also clarify that (a) such state law claims are not preempted[127] and (b) carriers that provided switched access services to the IXCs may rely on such state law claims to recover payment for services provided and that the "formerly tariffed rates" for such services constitute reasonable rates for recovery under state-law theories.[128]

Relatedly, the Commission has long recognized the ability of carriers to seek such equitable remedies when services are not covered by tariffs or contract. The Commission has expressly stated "the law recognizes – as has the Commission – that an agreement may exist even absent an express contract,"[129] and that contracts could be "implied-in-fact" or "implied-at-

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[127] The Commission has long recognized that services detariffed are not solely regulated by the Commission and that state contract laws apply. *See 1997 Order on Reconsideration of Mandatory Detariffing of Nondominant IXC Services*, ¶ 77 (after forbearing from the tariffing requirement for nondominant IXCs, the Commission clarified that the Communications Act governs the determination as to the lawfulness of rates, terms, and conditions; however, the Communications Act does not govern other issues, such as contract formation and breach of contract, that arise in a detariffed environment. It further explained that "consumers may have remedies under state consumer protection and contract laws as to issues regarding the legal relationship between the carrier and customer in a detariffed regime."); *see In re Universal Ser. Fund Tel. Billing Practice Litig.*, 619 F.3d. 1188, 1200-01 (10th Cir. 2010) (holding that after detariffing, the "[Communication Act] continues to preempt state law challenges to 'the rates, terms, and conditions for interstate, domestic, interexchange services' but not others, such as 'contract formation and breach of contract' merits deference."). Moreover, the Commission's General Counsel has conceded to the D.C. Circuit that for services provided outside of a tariff, state law claims are not preempted. *See* Brief for Respondents, Case No. 15-1354, at 33 (D.C. Cir., filed Aug. 16, 2016) ("Petitioners can make their arguments about their state law claims [,which are associated with services provided outside of a tariff,] to the district court…."); *Policy and Rules Concerning the Interstate, Interexchange Marketplace,* CC Docket No. 96-61, Order on Reconsideration, 16 FCC Rcd 10647, ¶ 77 (2001) (acknowledging that with detariffing "state consumer and contract laws" apply).

[128] The FCC must clarify that "formerly tariffed rates" are recoverable under state law theories; otherwise, IXCs will force endless litigation by arguing that *only* the Commission can determine what rates can be assessed for switched access services under state law theories and that Courts have no authority to determine what charges should be assessed for such services under such theories. *See, e.g.*, Exhibit A at 13; *North County Communications Corp. v. Verizon Select Services, Inc.*, No. 08-cv-1518, 2012 WL 10907044 at *6-*7 (N.D. Cal. Sep. 28, 2012).

[129] *Petitions of Sprint PCS and AT&T Corp. for Decl. Ruling Regarding CMRS Access Charges*, WT Docket No. 01-316, 17 FCC Rcd 13192, ¶ 12 (2002) (subsequent history omitted).

law," the latter of which is an "equitable remedy that is equivalent to an award of *quantum meruit*."[130] Other Commission decisions recognize such equitable remedies are not foreclosed when services are not provided pursuant to tariff.[131] Federal district and circuit courts have as well.[132] Even AT&T's ILEC affiliate has advocated for equitable remedies.[133]

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[130] *Id*., n.38; *see also 1997 Order on Reconsideration of Mandatory Detariffing of Nondominant IXC Services*, ¶ 34 ("as in any circumstance where there is no contract, the carrier, *at a minimum,* could seek to recover under a theory of quantum meruit.") (emphasis added) (subsequent history omitted). Moreover, the FCC has held that *"a carrier could seek recovery under an implied-in-fact contract theory* if a customer has used the carrier's services, with knowledge of the carrier's charges, but has not executed a written contract." *1996 Order on Mandatory Detariffing of Nondominant IXC Services*, 11 FCC Rcd 20730, ¶ 58 n.169 (emphasis added). The FCC explained that "[u]nder this theory, *the customer's acceptance of the services rendered* would evidence his agreement to the contract terms proposed by the carrier." *Id*. (emphasis added, citations omitted).

[131] *See All American Tel. Co. v. AT&T Corp*., File No. EB-10-MD-003, Memorandum Opinion and Order, 26 FCC Rcd 723, ¶ 19 (2011) (explaining that "even if the service is not specified in its tariff," "a carrier *may* be entitled to some compensation for providing a non-tariffed service…") (emphasis in original), *recon. den.*, 28 FCC Rcd 3469 (2013); *Qwest Communications Corp. v. Farmers and Merchants Mutual Telephone Co.*, File No. EB-07-MD-0001, Second Order on Reconsideration, 24 FCC Rcd 14801, n.96 (2009) (acknowledging that the carrier is not "precluded from receiving any compensation at all for the [non-tariffed] services it has provided to [the IXC]") (subsequent history omitted); *Total Telecomm. Servs., Inc., v. AT&T Corp*., File No. E-97-003, Memorandum Opinion and Order, 16 FCC Rcd 5726, ¶ 43 (2001) (explaining that "[i]t is well established that a purchaser of telecommunications services is not absolved from paying for the rendered services solely because the services furnished were not properly encompassed by the carrier's tariff (where, as here, the provider has no other means of attempting to obtain compensation.)"), *aff'd in relevant part*, 317 F.3d 227 (D.C. Cir. 2003); *New Valley Corp. v. Pac. Bell*, File No. E-87-50S, Memorandum Opnion and Order,15 FCC Rcd 5128, ¶ 12 (2000) (finding no basis in the Supreme Court's "Maislin [decision] or any other court or Commission decision for the conclusion that a customer may be exempt from paying for services provided by a carrier if those services were not properly encompassed by the carrier's tariff"), *aff'g New Valley Corp. v. Pacific Bell*, 8 FCC Rcd 8126, ¶ 8 (Com. Car. Bur. 1993); *America's Choice, Inc. v. LCI Int'l Telecom Corp.*, File No. E-95-08, Memorandum Opinion and Order, 11 FCC Rcd 22494, ¶ 24 (Com. Car. Bur. 1996) (holding that "a purchaser of telecommunications services is not absolved from paying for services rendered solely because the services furnished were not properly tariffed").

[132] *See, e.g., Worldcom, Inc. v. Graphnet, Inc.*, 343 F. 3d 651, 656-57 (3d Cir. 2003) (holding that although "no filed tariff . . . covered the services provided pursuant to the contracts at issue," plaintiff "could still recover the value of its services under a theory of unjust enrichment"); *Iowa Network Servs, Inc. v. Qwest Corp*., 385 F. Supp. 2d 850 (S.D. Iowa 2005) (explaining that "[a]n unjust enrichment claim may exist if this Court determines the federal tariffs inapplicable" and

Simply put, if an IXC receives switched access services that are mandatorily detariffed, the switched access service provider is entitled, at a minimum, to recovery payment for services under state law equitable remedies, such as unjust enrichment, quantum merit, or implied contract, to ensure that IXCs do not receive valuable switched access services without payment.[134]

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citing *Iowa Network Services v. Qwest Corp*., 363 F.3d 683, 694-95 (8th Cir. 2004)), *aff'd,* 466 F.3d 1091 (8th Cir. 2006)); *N. Valley Commc'ns, LLC v. Qwest Commc'ns Corp.*, 659 F. Supp. 2d 1062, 1070 (D.S.D. 2009) (holding that when carriers "tariffs do not apply,…the filed rate doctrine would not apply to defeat [the carrier's] unjust enrichment claim" and citing 466 F.3d at 1097). *Northern Valley Commc'ns, LLC v. MCI Commc'ns Servs. Inc.*, Nos. CIV. 07-1016, CIV. 07-4106, 2008 WL 2627519, at *5-*7 (D. S.D. June 26, 2008) (denying motions to dismiss state law claims, including unjust enrichment, because, *inter alia*, the filed rate doctrine does not bar claims for services not covered by the tariff).

[133] In *Southwestern Bell Telephone Company D/B/A AT&T Texas, Plaintiff, v. F. Cary Fitch d/b/a Affordable Telecom*, AT&T's ILEC affiliate filed a brief which argued, in part, that "in situations such as this, *quantum meruit* claims are not barred by the Filed Rate Doctrine. If the Court finds that the . . . [a]greement is not enforceable[] . . . []a claim in *quantum meruit* would lie with the measure of damages being the applicable tariff rates." *Southwestern Bell Tel. Co. D/B/A AT&T Texas, Plaintiff, v. F. Cary Fitch d/b/a Affordable Telecom*, Plaintiff Southwestern Bell Telephone Company d/b/a AT&T Texas' Response to Defendant's Motion to Dismiss & Supporting Brief, 2009 WL 3124134 ¶ 33 (S.D. Tex. filed July 7, 2009) (citing *Graphnet, 3*43 F.3d at 657). In that case, the Court agreed with AT&T's ILEC affiliate and upheld its *quantum meruit* claim. *Southwestern Bell Tele. Co. v. Fitch*, 643 F.Supp.2d 902, 910-11 (S.D. Tex. 2009).

[134] Any objection by AT&T of the conditions and clarifications requested herein will undoubtedly demonstrate its real motive behind its Petition is to obtain this result.

VII. CONCLUSION

For the foregoing reasons, the Commission should deny AT&T's Petition summarily or on substantive grounds. If the Commission grants the Petition (which it shouldn't), the forbearance granted should be subject to the conditions and clarifications set forth above.

Respectfully submitted,

/s/ Philip J. Macres
Philip J. Macres
KLEIN LAW GROUP PLLC
1250 Connecticut Avenue N.W.
Suite 200
Washington, DC 20036
Tel: 202-289-6956
Email: pmacres@kleinlawpllc.com

Allen C. Zoracki
KLEIN LAW GROUP PLLC
90 State Street
Suite 700
Albany, NY 12207
Tel: 518-336-4300
Email: azoracki@kleinlawpllc.com

Counsel for Consolidated Communications Companies and West Telecom Services, LLC

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